SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 888

HARRAH'S CLUB,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

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No. .....

HARRAH'S CLUB,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

Petitioner, Harrah's Club, a Nevada corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 11, 1966.[1]

OPINIONS BELOW

The opinion of the court of appeals (Appendix B, infra, pp. 7-14) is officially reported at 362 F. 2d 425. The Board's decision and order (Appendix C, infra., pp. 15-16) is reported at 150 NLRB 1702.

1. The opinion of the court below was handed down June 14, 1966. The decree enforcing the Board's order was entered July 11, 1966, and order denying rehearing was entered August 5, 1966.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1966 (Appendix A, infra., pp. 1-4). On October 17, 1966, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including December 20, 1966. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board arbitrarily and discriminatorily in violation of the due process clause of the Fifth Amendment of the Constitution of the United States, and to the prejudice of petitioner, asserted jurisdiction over petitioner, an operation in the gaming industry wholly within a single state (Nevada), while for identical reasons the Board declined to assert jurisdiction over the racing industry, an industry in competition with the gaming industry.

2. Whether the Court below gave mere lip service to this court's mandate in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D, infra, pp. 41-43.

STATEMENT OF THE CASE

Petitioner is engaged in operating gaming casinos in Reno and Stateline (Lake Tahoe), Nevada. It also has food and bevarage facilities in connection with its operations as an accommodation to its patrons (R. 14-15; Tr. 321-322, 5-6).[2]

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2. "R" references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; references designated "G.C.X." or "R.X." are to the exhibits of the General Counsel and the petitioner, respectively. A copy of this material has been filed with this petition.

At its Stateline casino petitioner has a large room (South Shore Room) in which it serves dinners and presents performances for the entertainment of its patrons (R. 14-15).

On or about July 1, 1963, one of the supervisors at Stateline who had certain responsibilities for the entertainment received a letter from an employee who was on military leave overseas. This veteran wrote that he had "dreamed of the day when I can leave here and return to Lake Tahoe", and that he should be out of the service by the end of August and "ready to go to work sometime around the end of August" (G.C.X. 3(a) & (b)). This veteran had been employed prior to his military service as a stage technician in the South Shore Room (Tr. 171-172).

In the early part of August, 1963, petitioner received a letter from the Regional Director of the Bureau of Veteran's Re-Employment Rights, United States Department of Labor, stating the veteran had recently been released from military service and that at "the time of separation he requested specific information about his reemployment rights; it is possible that he already has been in touch with you." The letter also stated that the Bureau desired "to be of service both to you and to this ex-serviceman if he desires to return in accordance with reemployment legislation." Accompanying this letter was a form requesting information as to "pay, promotional opportunities, and other benefits based on seniority accrued during his service in the armed forces" (R.X.1). Petitioner completed and returned the form to the Bureau (Tr. 337-338).

This was the first such matter which petitioner had ever handled. The problem was discussed between supervision in the entertainment department and the director of industrial relations as to how to comply with "the mandate of the law". Since petitioner could not absorb another man on its stage crew, it was determined that one of the crew

would have to go to make an opening for the returning veteran (Tr. 339). The logical one to go would be the one with the least seniority in the entertainment department of which the stage crew was a part (Tr. 340). The personnel records of that department were reviewed and it appeared that Robert Wetherill, a member of the stage crew, had the least seniority in that department (Tr. 340-341, 559-560).

Sometime about the middle of August, 1963, the veteran telephoned the supervisor to whom he had written and arranged to come to Lake Tahoe the next day for a conference concerning his return to his job. At the conference, the veteran told supervision he wanted to report back on the job about September 1. This was agreeable to supervision. The veteran left both his current address and two telephone numbers where he could be reached should he be wanted back sooner (Tr. 176-178).

On August 30, because of an important production number to be presented in the South Shore Room, it was deemed desirable to have the veteran return a day or so sooner so he could participate in tearing down of the old show and setting up the new show. This would enable him to become acquainted with the new show which would run through part of September, the month in which he wanted to return to his job. Supervision telephoned the veteran and asked him to report the next day. He did so and was put to work (Tr. 178-179, 710).

After the second show in the early morning of September 1, and in accordance with the custom and practice not only at petitioner's operations but also in the gaming industry, Wetherill was informed by supervision of the necessity to terminate him and the reasons therefor (Tr. 27-29, 705, 707, 721-22, 844-45, 849-52, 855-56, 868-70). Wetherill, who among others in his department had engaged in union activity, asked if his discharge had anything to do with such

activity. Supervision assured him this had nothing to do with it (Tr. 706-709). A termination slip was given Wetherill which stated the reason for termination was "to make room for a returning serviceman" (Tr. 120).

Thereafter Wetherill requested and received a hearing before a board of review which unanimously upheld the termination. The board of review consisted of three members, an employee representative elected by the employees in the entertainment department by secret ballot, a representative of the club (petitioner), and the director of industrial relations (R. 38, n. 40; Tr. 31-32, 305).

Subsequently unfair labor practice charges were filed alleging petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act in discharging Wetherill. A complaint was issued and a formal hearing was held before a Trial Examiner who made findings that the Board had and could assert jurisdiction over petitioner and findings supporting the charge although he found there was no question "regarding Walker's [the veteran] seniority or his right to the job" (R. 41) and although he found that petitioner's stage crew was "already over-staffed", and that supervision "was being criticized for maintaining a much larger stage crew than any comparable casino in Las Vegas". (R. 41). Exceptions and a brief in support were filed with the Board by petitioner. The Board rendered a decision in which it rejected petitioner's contention as to jurisdiction and as to the findings and recommendations by the Trial Examiner. Completely ignoring its decisions in cases involving the racing industry, the Board asserted jurisdiction on the very rationale which it used to decline jurisdiction over the racing industry. The Board's position is that the matter of jurisdiction lies solely within its discretion (R. 57-58, 48-50). The Board ordered petitioner to reinstate Wetherill with back pay and without

prejudice to his seniority and other rights and privileges (Appendix C, infra, pp. 16 and 39, R. 49-50).

The Court of appeals enforced the Board's Order. It held that "assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated." The court below concluded "there is nothing in the record to support a finding or conclusion that such prejudice will result." It then went on to state that the record as a whole supports the Trial Examiner's ultimate finding adopted by the Board (Appendix B, infra, pp. 17-40).

REASON FOR GRANTING THE WRIT

1. During the course of the oral argument before the court below, the presiding judge made the observation that the whole issue of the Board's jurisdiction was "a fuzzy one". One of the other judges on the panel expressed the view that the matter of the Board's jurisdiction should probably be handled "politically". The issue is important not only to petitioner but to the Board's administration of the Act and to all businesses which may come within reach of the Board. There are at present approximately fifteen unfair labor practice cases at various stages in which complaints have been issued by the General Counsel of the Board against gaming casinos in Nevada and approximately twelve representation cases. In several of the complaint cases, the Board has issued a decision and order requiring casinos to undertake certain affirmative action and to take other negative action. These latter cases will soon reach the court of appeals and the others in all probability will also

in the near future. It thus becomes imperative that there be a definitive decision by this court to serve as a guide to the public, the courts of appeals, and the Board on this crucial issue of the Board's jurisdiction.

The jurisdictional question decided in this case is a difficult, important, and recurring one in the administration of the federal labor laws. The answer given by the court below and the Board confuses rather than clarifies and appears to be in conflict with applicable decisions of this court and erroneous. Moreover, the jurisdictional issue here is of equal, if not greater importance, than in *National Labor Relations Board v. C & C Plywood,* No. 53 in which this court granted certiorari on April 18, 1966. In the circumstances review by this Court is clearly warranted and required.

Section 10(a) of the National Labor Relations Act states that the "Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce" (29 U.S.C. § 160(a)). The term "commerce" and the term "affecting commerce" are defined in Section 2(6) and (7) of the Act, 29 U.S.C. § 152(6) and (7). (Appendix D, infra, p. 42) It is recognized that the Board in its discretion may by decision or published rules decline to assert jurisdiction over any labor dispute, "where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" (Sec. 14(c)(1), 29 U.S.C. § 164(c)(1)).

While the Board has discretion in the area of jurisdiction, it is not unlimited. This and other courts have set aside the Board's exercise of jurisdictional discretion that are arbitrary, unreasonable, discriminatory or capricious. *Office Employees Int. Union v. National Lab. Rel. Bd.,* 77

S. Ct. 799; *Hotel Employees Local No. 255 v. Leedom*, 79 S. Ct. 150. In one of the early decisions pertaining to the Act, this court in *Labor Board v. Jones & Laughlin*, 57 S. Ct. 615, dealing with the term "affecting commerce", said:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . We are thus to inquire whether in the instant case the constitutional boundary has been passed."

Moreover, the *Administrative Procedure Act* (5 U.S.C. § 1009(e)) provides that the reviewing court shall "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Since 1950, the Board as matter of policy has consistently declined to exercise jurisdiction over racetracks. *Los Angeles Turf Club, Inc.* 90 N.L.R.B. 20 (1950); *Hialeah Race Course, Inc.*, 125 N.L.R.B. 388 (1959); *Jefferson Downs, Inc.*, 125 N.L.R.B. 386 (1959); *Pinkerton National Detective Agency, Inc.*, 114 N.L.R.B. 1363 (1955).

The Board has not only declined jurisdiction over racetracks but has extended its declination to breeders of race horses. *Meadow Stud, Inc.*, 130 N.L.R.B. 1202 (1959) and *Walter A. Kelley*, 139 N.L.R.B. 744 (1962). Of particular importance here, the Board has recently even declined jurisdiction over food concessionaires at racetracks. *Hotel & Restaurant Employees Union (Resort Concessions, Inc.)*,

148 N.L.R.B. 208 (1964). The Board expounded its rationale in *Hialeah Race Course, Inc., supra,* as follows (125 N.L.R.B at 390-391):

> ". . . it is our opinion that the effect on commerce of such labor disputes is not sufficiently substantial to warrant the exercise of the Board's jurisdiction. In the first place, in *Los Angeles Turf Club,* the Board had occasion to consider racetrack operations of comparable size and character to the ones involved herein, and found that such operations, although not wholly unrelated to commerce, were essentially local in character. . . . In the second place, Board declination of jurisdiction will not leave the labor relations of such operations unregulated. Congress, in addition to establishing the Board's discretionary authority to decline jurisdiction, specifically provided for State assumption of jurisdiction in such situations. Given the character of racetrack operations, which are permitted to operate by reason of special State dispensation, and are subject to detailed regulation by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consonant with their basic policy. In these circumstances, we anticipate little interference or obstruction with commerce resulting from labor disputes in the racetrack industry as a result of our decision to decline to assert jurisdiction over such operations."

Recently the Board has emphasized its second line of reasoning—the existence of extensive state regulation and the likelihood that the states will not tolerate drawn out labor disputes in this field because of the important revenue derived from racing activities. In *Walter A. Kelley, supra,* 139 N.L.R.B. at 747, the Board said:

> "Because of the important revenue derived from racing activities, State governments have a strong interest

> in insuring uninterrupted operations at racetracks. . . . We believe that, because of the unique nature of the racing industry, the regulation of labor matters governing employees should be left to the States, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so. The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry."

Horse racing is conducted in twenty-eight states.[3] Betting takes place just as it does in gaming. Horse racing involves constant movement across state lines of horses, equipment, trucks, airplanes, racing paraphernalia, money, jockeys, trainers, apprentices, owners, employees, judging officials and of those who desire to improve the breed by their wagers. Racing results, selections, and other horse racing information are transmitted and reported by the press, wire services and other means throughout the United States. There are even publications devoted exclusively to horse racing, e.g., the Daily Racing Form. There is an intimate relation of racing to allied industries such as, totalizators and racing publications. *Los Angeles Turf Club, Inc.*, 90 N.L.R.B. 20.

The Court of Appeals borrowing from the Board's brief, stated that "the Board points out that gaming is the major industry of [Nevada] and that it annually attracts more than twenty million tourists to Nevada, entailing vast use of interstate transportation facilities." (Appendix B, infra, p. 9) There is not a scintilla of evidence in

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3. *Statistical Reports on Horse Racing in the United States For The Year 1965* (The National Association of State Racing Commissioners, March, 1966) Table No. 1 (Hereafter cited "Statistical Reports").

the record to support any such conclusions. Assuming, *arguendo,* that gaming is the major industry of Nevada, then *a fortiori,* the Board's rationale in the racetrack cases is all the more reason for the Board to decline to assert jurisdiction over gaming confined to this one State. Indeed, it is highly questionable whether under the Congressional declaration of policy and the definitions of "commerce" and "affecting commerce", the Board has statutory jurisdiction (Sec. 1(b), Sec. 101, Sec. 2(6), Sec. 2(7).) Petitioner's operations are purely local in character; they are legal only in Nevada. Moreover, if as the Board has found, horse racing is local in character, gaming in Nevada is at least so if not more so.

In its *raison d'etre,* the Board lays stress, among other things, on tourists in Nevada as being attracted by gaming. The court below borrowed this thought also, even though the record is barren of any evidence to support such a conclusion. Yet, neither the court of appeals nor the Board mention nor gave consideration to the fact that far more people are attracted to and attend races than do casinos in Nevada. Horse racing attendance was 62,887,478 in 1965. (*Statistical Reports,* note 2, *supra*) The opinion of the court below refers to 20,000,000 Nevada tourists (Appendix B, infra p. 9). Both the court of appeals and the Board are silent on whether all of these Nevada tourists, or what proportion, attended casinos.

The court of appeals, again borrowing from the Board's brief, states that the tourists annually attracted to Nevada by gaming, entail vast use of interstate transportation facilities" (Appendix B, infra, p. 9). Here again there is no evidence in the record to support this. Nonetheless, in *Los Angeles Turf Club, Inc., supra,* and the decisions following it, the Board has continually regarded

such transportation as *incidental* to the "sporting events" and not altering their local character.

The basic and principal ground on which the Board premises its position, is that gaming is the major industry of Nevada, supplying that state with considerable tax revenue. Whether gaming is the major industry or only one important industry in Nevada's economy is not disclosed by the record. Be that as it may, it is hardly pertinent to the issue. Horse racing provides vastly greater tax revenue for the individual states in which it is carried on than does gaming in Nevada. Racing provides more than twenty-five times as much revenue to the various states.[4]

The board asserts that gaming is more important to the economy of Nevada than horse racing is to the economy of the states permitting racing. This hardly aids the Board since it emphasizes the purely local character of gaming which is legalized in only one state. In making this argument, the Board has switched and tortured its reasoning in the racetrack cases. The Board does not rest its decisions in those cases on the ground that racing was not important to the economy of the states involved. On the contrary, the Board stressed the importance of racing to the states, saying "(b)ecause of the important revenue derived from racing activities, state governments have a strong interest in insuring uninterrupted operations at racetracks. *Walter A. Kelley,* 139 N.L.R.B. at 747.

This "strong interest" of the state, of which the Board speaks, in not having labor disputes interrupt operations

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4. The Board stated tax revenue to Nevada from gaming was $13.7 million. Tax revenue from horse racing to all of the states in which it takes place was over $369 million in 1965. Five states had tax revenue from horse racing in excess of $14 million. California (neighbor of Nevada)—$47.5 million; Florida—$16.2 million; Illinois—$30.5 million; New Jersey— $28.8 million; and New York—$140.4 million. *Statistical Reports,* note 2, *supra*).

at racetracks is, in light of the Board's own argument, even stronger as to gaming in Nevada. For, if gaming is as important to Nevada's economy as the Board claims, then Nevada would have an even "stronger interest" in "insuring uninterrupted operations". Thus, the vice of the Board's position and its arbitrariness and capriciousness is that in the horse racing cases it declines jurisdiction because the state has a "strong interest" and it asserts jurisdiction over gaming for the very same reason.

The Board referred to extensive regulation of horse racing by the states involved as another reason for declining jurisdiction. Yet, gaming is regulated more extensively in Nevada than is horse racing elsewhere. The Board admitted in the court of appeals that gaming is extensively regulated by Nevada. Such regulation includes detailed provisions governing licensing of gaming operations, far-reaching supervision of the entire industry, including regulations pertaining to personnel. The Board has here, where there is present the identical reasons on which it based its declination of jurisdiction over horse racing, ignored those reasons and, this, on wholly frivolous and untenable arguments. It has thereby lent confusion to the entire issue of the Board's jurisdiction. So has the court of appeals. In an earlier case, the court below referred to the necessity of showing prejudice will result by virtue of the Board's assertion of jurisdiction. *N.L.R.B. v. Gene Compton Corp.*, 262 F.2d 653. In its opinion in the instant case, the court speaks of the need to establish "substantial[ly] prejudice will result" (Appendix B, infra, p. 10). Presumably the court below was satisfied there was prejudice to petitioner but that it was not "substantial". This requirement of showing substantial prejudice was a new dimension added by the court of appeals in this case. Since the court of appeals has not

given us the quantum or quality of proof required to show that petitioner is "substantially prejudiced", petitioner, counsel, and others in similar situations are left completely in the dark as to what the court of appeals means by its use of that phrase. In the petition for rehearing, the court below was also asked to elucidate and to remand the case back to the Board to permit evidence to be presented to show substantial prejudice. The petition was denied in toto.

As mentioned, the Board has extended its policy in the racetrack cases to breeders of racehorses, *Meadow Stud, Inc.*, 130 N.L.R.B. 1202; *Walter A. Kelley*, 139 N.L.R.B. 744,[5] and to food concessionaires at racetracks, *Hotel & Restaurant Employees Union (Resort Concessions, Inc.)* 148 N.L.R.B. 208, and to a private detective agency which furnished patrolmen and ushers to racetracks, *Pinkerton National Detective Agency*, 114 N.L.R.B. 1363. The Board has also declined to assert jurisdiction over an indoor sports arena, *Olympia Stadium Corp.*, 85 N.L.R.B. 389. In two cases the Board stated it would assert jurisdiction because it noted that there was an absence of detailed regulation by other public authorities as contrasted with the racetrack cases. *League of New York Theatres, Inc.*, 129 N.L.R.B. 1429, and *Ray, Davidson & Ray*, 131 N.L.R.B. 433.

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5. Race horse breeding is a syndicated business running into billions of dollars. *Fortune Magazine*, Jan. 1966, page 159.

Petitioner in its petition in the court below for rehearing or in the alternative for remand to the Board, offered to present newly discovered evidence in the form of an extensive study by Stanford Research Institute showing that horse racing is in competition with gaming in Nevada *(California's Horse Racing Industries—An Economic Analysis)* and that the Board's assertion of jurisdiction prejudices petitioner and the gaming industry by adding an additional regulatory burden and a considerable cost factor to the operations of gaming while horse racing is free from such burden and cost.

To add to the confusion, the court below in its opinion in *N.L.R.B. v. Gene Compton's Corporation, supra,* stated that the record there was "devoid of sufficient evidence to justify a finding that the Board has refused to take jurisdiction of other businesses of a nature indistinguishable on relevant grounds from respondents." Here, as we have shown, the Board has refused to take jurisdiction over racetracks. Clearly, racetracks are businesses "of a nature indistinguishable on relevant grounds" from casino operations. The life of both businesses depends upon betting. Without betting neither would exist and neither would be a source of tax revenue to the states.

In its summing up of the jurisdictional issue, the Board emphasizes the importance of gaming to Nevada. From this the Board maintains that a labor dispute could disrupt commerce substantially. There is no explanation by the Board as to how a dispute at a single casino in one state could disrupt commerce any more than at a racetrack. The Board does not support its conclusion with a single fact. It does not do so because it cannot. It must be apparent to any objective observer that a labor dispute in a single casino out of the many in Nevada would be far less disruptive than a labor dispute at what might be the only large racetrack in a given state.

As was said in *Farrell v. County of Placer,* 23 Cal. 2d 624 (1944), at 628:

> "It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government," it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' (48 Harv. L. Rev. 1299)."

It is hardly rectangular rectitude to treat persons differently by distinctions without a difference. It is well

settled that guarantees of due process of law and the equal protection of the laws have the same meaning. The Board's case, however, rests on such distinctions.

The Board's treatment of gaming as compared with its treatment of racetracks and business activities associated therewith, amounts to class legislation and is arbitrary, unreasonable, discriminatory and capricious. It constitutes a violation of the due process clause of the Fifth Amendment of the Federal Constitution. This court has said that arbitrary discrimination between persons in similar circumstances is a denial of due process of law, and that the exercise of the commerce power is subject to the Fifth Amendment. *Currin v. Wallace,* 59 S. Ct. 379.

2. In *Universal Camera Corp. v. National Labor Rel. Bd.,* 71 S. Ct. 456, it was held that with the advent of the Taft-Hartley Act and Administrative Procedure Act, "Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof." The mandate of that decision requires the court of appeals in looking for substantiability of evidence, to take into account whatever in the record fairly detracts from its weight and this means that the courts must "consider the whole record." Mr. Justice Frankfurter in writing the court's opinion, ably expressed the view that "a formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application." He went on to state that "some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry." He reminded that "judges are not automata" and that the "ultimate reliance for the

fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." Referring to the legislative history of the Taft-Hartley Act and the Administrative Procedure Act, he said it "demonstrates a purpose to impose on courts a responsibility which has not always been recognized."

Here, the court of appeals, obviously did not perform the obligation laid upon it. A reading of the opinion of the court below demonstrates that it borrowed copiously from the Board's brief and from the trial examiner's decision. The Board's brief, like its decision, was based on a careful selection of parts of the evidence which, in its view, supported its theory. Had the court below assumed its responsibility for the "reasonableness and fairness of Labor Board decisions," it would upon reviewing the record as a whole perforce had to conclude that there was no substantial evidence when viewed on the record as a whole to support the Board's finding that Wetherill was discriminatorily terminated. The Board reached its conclusion on the unsupported finding that Wetherill was not junior in the entertainment department. It did this by ignoring petitioner's organizational structure and the established fact that seniority was by department and not company-wise.

Wetherill's employment with petitioner began in the sound department as a sound console operator. The console was physically located in the South Shore Room in which the stage was located but at opposite ends (Tr. 332). His supervisor was the sound engineer (Tr. 935-937). The sound department was under the supervision of the manager of construction and maintenance (R.X. 4, 13; Tr. 329-331, 519-521). He left his job on the console because of illness. After recovering, he did not want to return to

the console because he found that job too nerve wracking. He inquired as to whether there was an opening on the stage crew in the entertainment department. There was one and he was given it. The opinion of the court of appeals states he "was transferred at his request to the job of stage hand" (Appendix B, infra, p. 11). This is what the Board's brief states, but it is not what the record shows. The evidence was that he was not transferred but was hired in as a new employee. The evidence further showed that when leaving one department and going to work in another, seniority does not carry over from department to department. Supervision was totally different in the two departments. The entertainment department operated under a vice-president separately from the sound department which operated under a manager of construction and maintenance The sound console operator was never classified as part of the entertainment department (Tr. 333, 578, 591, 704, 780). Although documentary and other evidence was introduced showing petitioner's organizational setup and definite demarcation of departments, the Board ignored this and adopted the Trial Examiner's conclusion that petitioner did not maintain a rigid separation of departments and that the functions of the sound console operator were more directly related to those of the stage crew than those of the sound department. The court below went along with this. (Appendix B, infra, p. 14, R. 44) Without such conclusion, the Board's case must fall. If Wetherill's service with petitioner as a sound console operator and as a member of the stage crew, which all together was less than a year, could not be lumped together he was, even admittedly by the Board, the junior member of the stage crew. To accomplish this was crucial to the Board's theory of discrimination. The Board's anxiety about this is made even more evident by the fact that while reaching its conclusion Wetherill

was not low man, it does not tell us who, in its judgment, was. In fact, the Trial Examiner, whose findings the Board adopted, did not even find that Wetherill was not the low man. The most he would say was that "a tenable basis exists for concluding the job of sound console operator was actually in the Entertainment Department, and, since Respondent contends that it applied departmental seniority in making its decision, Wetherill should not have been discharged" (Appendix C, infra, p. 32, R. 45). This can hardly be said to be a finding, let alone a finding based on evidence.

It seems rather apparent that the court below here abdicated its reviewing obligation with respect to Board decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)